

Bankruptcy Glossary

Parties:

Debtor - Party who is seeking bankruptcy relief. Debtors come in many forms including consumer individuals, partnerships, corporations, business trusts and municipalities. The Bankruptcy Code does, however, provide certain eligibility criteria for filing under each chapter of Title 11. Not all entities qualify to be debtors under every chapter. The eligibility elements are found at 11 U.S.C. 101 and 109. For example, only 'family farmers' who meet the definition as outlined are eligible to file Chapter 12 cases, and only 'individuals' (not corporations) are eligible to file Chapter 13 cases. Chapter 7 (liquidation) and Chapter 11 (reorganization) offer the least restrictive opportunities for debtor filings.

Debtor in Possession- Used to refer to a reorganizing debtor under Chapter 11 of the Code. The term signifies that the debtor remains in control of the business and is permitted to make day to day decisions about the operation of the reorganizing company. If the debtor in possession (d-i-p) negligently or purposefully mismanages the financial affairs, the Court may consider replacing the d-i-p with an operating trustee in the best interests of creditors. The d-i-p usually contests the appointment of a trustee since control will be lost, and there may be further litigation involving the bankruptcy judge's decision to appoint a trustee.

Creditor - Party who is owed, or who has a measurable claim against the debtor. Note that these creditors are generally required to file formal proofs of claim with supporting documentation to participate in any distribution from liquidation of estate property. There is frequently litigation surrounding deficiencies in claim documentation, allowance of these claims, and proper prioritization of claims between competing creditors.

~~***Secured creditors*** - Those creditors who received a pledge of collateral from the debtor in return for a loan or extension of goods/services. In bankruptcy cases, if property in which a secured creditor has a lien is sold, the secured creditor gets paid first to the extent of the value of their lien before general creditors receive anything. Secured creditors do not receive any cash distribution in many cases, however. If the liens exceed the value of the property, the trustee relinquishes interest in the asset and these creditors foreclose outside of the bankruptcy court proceeding.

~~***Unsecured creditors*** - Often referred to as 'general creditors'. These parties do not

have any collateral or security agreement to protect repayment of the claim. These are the creditors most affected by the bankruptcy discharge. If they receive anything it is usually a small cash distribution out of the estate funds collected by the trustee, and the remainder of the debt is discharged.

~~**Priority creditors** - Unsecured creditors who are entitled to receive first distribution of estate funds by operation of law. Usually taxing authorities or former employees of a debtor company. If funds are available to make a distribution to creditors, priority creditors are paid in full before the general creditors receive anything.

Trustee- Independent party (usually an attorney but not necessarily so) automatically appointed in Chapter 7, Chapter 12 and Chapter 13 cases to liquidate non-exempt property, defend the estate, litigate fraudulent conveyances of property and preferential payments made by a debtor on behalf of creditors, make distributions to creditors who have filed claims and perhaps object to the discharge of a debtor. In a Chapter 7 case the trustee is often referred to as a 'liquidating' trustee and assumes all of the above functions. In Chapter 12 and Chapter 13 cases the trustee is often viewed primarily as a disbursing agent who collects voluntarily payments from the debtor pursuant to a court approved plan and remits installments over time to creditors. Appointment of a trustee in a Chapter 11 case is unusual and done only when creditors can demonstrate that the reorganizing debtor is dishonest or committing fraud, and the court believes management must be replaced with an 'operating' trustee.

Creditor committees - Involved only in Chapter 11 cases to monitor the debtor's progress toward a repayment plan, review interim financial disclosures and call issues involving debtor deficiencies to the court's attention. Creditor committees have standing to object to many reorganization case administration issues and are likely parties in appeal litigation. In the absence of an operating trustee in most reorganization cases, the opportunity for creditors to participate in these committees offers the ability to assure the debtor moves as quickly as possible toward repayment. When the debtor is taking too long to propose a plan or is depreciating estate property from which they hope to obtain some recovery, these committees become very active.

United States Trustee - Provides administrative oversight to individual case trustees. The UST is part of the Department of Justice and not directly related to the court. In fact, the UST is statutorily considered a party in interest like other litigants. Although functions are largely administrative (assuring adequate bonding of trustees, reviewing case reports of trustee progress, approving final distribution reports), the UST does

have standing to intervene and participate in all cases and may be a party in an appeal.

Examiner - Person appointed by the bankruptcy judge if deemed necessary to review financial books and records, evaluate feasibility of reorganization and report findings to the court. Usually involved only in larger Chapter 11 cases. Parameters of duties on a case by case basis are established by the court within the appointment Order.

Professional persons - Accountants, appraisers, attorneys, tax specialists, auctioneers, brokers appointed by the court upon motion of a party in interest to assist the trustee or debtor in possession with case administration. There are significant issues involving ‘disinterestedness’ of these professionals at the appointment phase and with the level of compensation after services have been provided in the case. There is often litigation involving whether such parties are truly necessary and objections to proposed compensation. Since these parties are paid from estate assets before any distribution is made to general creditors, the creditors are usually unhappy about the impact retention will have in reducing their ultimate recovery.

Parties to an appeal - Can be any party in interest in the case. Bankruptcy litigation is very issue specific and involves different combinations of the above referenced groups depending on who is affected by that limited issue. The appellant may well be any of the above and an assumption cannot be made, for example, that the trustee will most often be the appellant and the debtor an appellee. A professional person may want to litigate the disallowance of a portion of his fee or it may be a creditor committee objecting to a bankruptcy judge’s extension of time to permit the debtor to do something. An analysis of the underlying cause of action and issue on appeal will help identify the interests of the respective players.

General terms (alphabetically):

Abandonment - The formal act of relinquishing court interest in specified property of the debtor’s estate. This can be accomplished upon motion of a creditor or upon notice by the trustee. If property is valueless or administration of the asset would be unduly burdensome the court may direct that it be abandoned.

Automatic stay - Perhaps the most significant single doctrine in bankruptcy law. The Code provides that an injunction arises automatically upon the filing of a petition which stays all creditor collection attempts, stops pending state court litigation and prevents third parties essentially from doing anything to impact on the bankruptcy court’s administration of the case or debtor assets. A creditor or party in interest who

desires to continue execution against the debtor, repossess property or continue with other litigation in which the debtor is a party must first seek relief from this stay in the bankruptcy court. A creditor who violates the stay is subject to severe sanctions, including punitive damages. There is very often significant litigation concerning the scope of the stay and post petition creditor conduct.

Confirmation - Process of court approval of a repayment plan in Chapters 11, 12 and 13. The Code provides very specific criteria for evaluation of the debtor's proposal and the bankruptcy judge must weigh a number of factors against the elements identified in confirmation statutes. Creditors, not surprisingly, frequently argue that the debtor should be able to pay more and to do so sooner than projected. The confirmation process often involves asset valuation disputes, classification of creditor claims, appropriateness of disparate repayment treatment of different creditors and objections to continuing company management structure. Debtors regularly are required to consider several drafts or amendments to the first proposal and the confirmation process can last for months in a large case. Creditors are bound thereafter by what the bankruptcy judge feels is fair and equitable as a result of the confirmation hearings. A significant issue for appeal litigation.

Conversion - The process of 'changing' relief from one chapter to another after the case is filed. The debtor may voluntarily decide to give up on a repayment effort and convert to a straight liquidation, or creditors may petition the court to order a conversion under certain circumstances. A debtor who desires to reorganize will usually object to a creditor attempt to force conversion to a liquidation, and some appeal issues will develop from this concept. Issues involving whether a debtor is taking too long to propose repayment, or whether a debtor is making reasonable progress toward completion of the case are always fact specific and subject to considerable interpretation.

Discharge - Relief granted to a debtor recognizing the extinction of liability for the debts listed. This is always accomplished via an Order issued by the bankruptcy judge and operates as a continuing injunction or bar to any collection attempt by pre-petition, scheduled creditors. It is presumed that a debtor will be granted a discharge unless creditors or other parties in interest (trustee) object. There are very stringent criteria for objecting to the grant of discharge and deadlines within which to do so, and there is frequently litigation involving whether or not a debtor who has demonstrated some egregious conduct (hiding property, falsifying records, lying to the court) should be receive the benefit of discharge.

Dischargeability of certain debts - The Bankruptcy Code provides that individual creditors may object to the dischargeability of their particular claim even though they may not wish to litigate the issue of a general discharge. For example, a debtor may have provided false financial information to a bank at the time of a loan and the bank may seek an Order from the bankruptcy court finding that particular claim to be 'non-dischargeable' even if all other creditor claims are discharged. Alimony, child support, wilful tort claims, student loans, certain taxes and unlisted debts are basic examples of other claims that may be declared non-dischargeable. Note that the creditor has the burden of affirmatively objecting. The menu of non-dischargeability grounds is not generally self executing, and a significant portion of adversary litigation involves these kinds of disputes.

Estate - Created when a debtor files bankruptcy and consists of all property in which the debtor has an interest. This is essentially the property available for liquidation by the trustee subject to certain exemptions and related issues. In a reorganization case, all property the debtor acquires during case administration is also considered estate property and must be used to fund the repayment plan.

Executory contracts - Contracts other than basic repayment agreements to which the debtor is a party which are not yet fully performed. These may be current leases, sales agreements, options to buy, etc. These have significant implications in a bankruptcy case because the debtor has the right to elect to continue performing ('assuming' the contract) or to reject the remainder of the contract during case administration. Rejection may carry creditor damages implications, and assumption of a contract may bind the debtor to offering cash security to assure future performance. When executory contracts exist in a case, there is usually litigation involving the debtor's ability to accept/reject and what the follow on expectations from third parties to the contract will be.

Exemptions - Property a debtor may retain free of creditor or trustee claims which is deemed necessary for basic support and maintenance. The Bankruptcy Code identifies a menu of specific, enumerated property and certain ceiling dollar limits in value to qualify as exempt property. Each state also has exemption statutes, and some states have 'opted out' of the federal Code listing in favor of their local jurisdictional limits. There are, not surprisingly, disputes between creditors and the debtor regarding value of property and ability to assert these exemptions. Non-exempt property is what the debtor loses to the Chapter 7 trustee for liquidation to benefit general creditors. Exemptions are not as important in repayment cases because the debtor is voluntarily paying for this property.

Fraudulent conveyance - Transfer of cash, goods or property by a debtor to a third party with the intent to defraud creditors or hinder creditor recovery. As distinguished from preference, these are usually transfers to someone close to the debtor to 'hold' property beyond the reach of the trustee or creditors until after the case is finalized with the expectation the property will then be returned to the debtor. If the trustee or creditors can prove the elements of fraudulent conveyance in the Code, the property is returned to the estate for liquidation and distribution to all creditors who file claims.

Meeting of Creditors - Approximately one month after filing of any case, a meeting of creditors is held to examine the debtor and make some preliminary determinations about initial case progress. All creditors are invited to attend and ask questions of the debtor. If a trustee has been appointed, the trustee is permitted to question the debtor. The bankruptcy judge does not preside at this hearing. The focus of this meeting is different depending on the chapter relief requested by the debtor. In a Chapter 7 case the questions involve available assets for liquidation and information that might support a creditor's litigation objecting to discharge. Conversely, in a reorganization or voluntary repayment case the creditors want to know what potential payment schedules might be offered and how soon the debtor can commit. Creditors are also evaluating whether to seek dismissal or conversion of the case, whether to seek relief from the automatic stay, whether to object to executory contract disposition, etc. based on debtor testimony during this hearing.

Petition - Papers filed to initiate any bankruptcy case. Most petitions are filed by debtors on a voluntarily basis seeking relief under one of the several chapters of the Bankruptcy Code. The debtor may intend to repay pursuant to some chapters, or conversely to acquiesce in a court directed liquidation of non-exempt property per Chapter 7 and this election is made within the petition. Petitions may also be 'involuntary' where creditors seek to force a debtor with assets who is not paying debts into bankruptcy. There is hostile litigation when creditors attempt to force a reluctant debtor into an involuntary liquidation.

~~***Joint petition*** - Only a husband and a wife may file a single, 'joint' petition under the Bankruptcy Code. This is usually done when debts and assets are substantially similar and avoids payment of two filing fees and the paperwork associated with two separate cases. Associated multiple corporations or partnerships must each file separate petitions. An individual may not file a joint petition listing himself and a closely held corporation or partnership as co-debtors. The Code strives to keep different legal entities in separate cases for purposes of categorizing assets, liabilities and perhaps different creditor groups, and only spouses may file a joint case.

Preferences - Payment by a debtor on certain creditor claims immediately prior to filing which appear to inappropriately 'prefer' some creditors over others. Typically the debtor pays family members who might not receive any distribution during the case or pays a bank/credit card company hoping to retain good customer status after the discharge. If a trustee or creditor committee can demonstrate elements within the preference Code section, the payment made or property transferred is returned to the bankruptcy estate for potential pro rata distribution to all creditors who file claims. Some of these issues result in appeal litigation and the offended party is usually the recipient of the transfer who now does not want to give it back.

Reaffirmation - An agreement between a debtor and creditor, negotiated on a post-petition basis, to renew the creditor's claim and continue with the existing repayment contract. A debtor agrees to do this when he desires to retain property secured by this loan agreement and cannot afford to redeem the property otherwise. Reaffirmations usually involve a new schedule of installment payments over an extended time or simply the continuation of the preexisting contract as if the bankruptcy had not been filed. A creditor cannot be forced to accept a reaffirmation and see this as an opportunity to negotiate a good return on the original debt.

Redemption - Available only to consumer Chapter 7 debtors as an opportunity to retain household goods and related family need property by paying a secured creditor the value of this property in return for the elimination of the pre-petition lien. A redemption is usually used where a debtor has pledged household furnishings or equipment to secure a loan and the outstanding loan balance/claim is significantly higher than the value of the items. The debtor can pay only the value of this collateral, receive a discharge of the remaining loan balance and exit the case with no existing lien on this property. The pinch for the debtor is that he must be able to redeem in a lump sum payment and often debtors do not have sufficient available cash to do this.

Schedules and Statements - Papers filed in every case to list with specificity all known creditors, assets, unfulfilled contracts, loan guarantors, and current financial information about the debtor. The debtor must also provide narrative answers to questions about recent property transfers and payments, residences, prior business relationships, etc. Together with the petition, these documents represent the packet of information provided to the court by a debtor. There are often disputes regarding the completeness of disclosure, accuracy of this information and valuation of assets within the schedules.

Procedural terminology:

Motions and applications - The Bankruptcy Rules of Procedure provide that certain types of requested relief discussed above may be raised by motion or application. Usually all parties in interest are served by movant or the bankruptcy clerk with notice of the pending application and an opportunity to object. If no party objects, the bankruptcy judge may often enter an order permitting the requested relief without a formal hearing or follow on bench time. This is the distinguishing element in general motions vs. ‘contested’ motions or adversary proceedings. If the issue does not rise to the level contemplated by the Rules to be especially significant, or if no party makes a timely objection, the judge may enter a summary order.

Contested matters/motions - Motions which are defined by the Rules to involve issues so regularly accompanied by objection and litigation that they are treated as expected contests from inception. There are usually more layered procedures offering opportunity for objection and the bankruptcy judge will usually conduct some hearing even in the absence of filed objections before drafting an order for relief. A general application (above) can also turn into a contested matter if well founded objections are raised. Contested motions are always litigated within the main case file and are simply a part of the regular docket in the primary case.

Adversary proceedings - Issues defined by the Bankruptcy Rules to be so fundamental that any litigation must be commenced in a separate, but related, proceeding. These are often referred to a “cases within a case”. Procedures parallel a civil case with special pleading rules, service rules, use of summons and answer procedures, discovery, trial and pre-trial expectations, and lengthy bankruptcy court opinions. For example, issues involving whether to grant the discharge, dischargeability of a particular debt, validity of purported liens on property, revoking plan confirmation, obtaining special injunctions or declaratory judgments must always be raised as an adversary complaint and not by motion. Adversary proceedings are both time consuming and expensive, but the level of sophistication within the dispute usually warrants this extended structure. When an appeal progresses out of an adversary proceeding, we always use both the main case number and adversary case number in the caption.